In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 292

ELIZABETH JOAN ALLEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented is whether decedent's bequest to his surviving spouse qualifies for the estate tax marital deduction or whether it constitutes a nondeductible terminable interest. See 1954 Code § 2056.

Under Part I of his will the decedent bequeathed his entire estate to his surviving spouse upon condition that she would, after his death, "sign and execute an agreement suitable to the Surrogate under whose jurisdiction this Will will be probated, and file

it in the Surrogate's Court, or any such other place as the Surrogate may direct, under which agreement she is to contract to make a Will and leave her estate, which is to include the assets of her own estate * * * [after certain specific bequests not in issue here] to be shared in equal parts among my four children * * *" (Pet. 7-8). In Part II of his will decedent provided that, if his widow did not comply with the condition stated in Part I, he bequeathed to her only "such share of my estate as the law requires to be given to a surviving spouse" and bequeathed the residue of his estate to his daughter born to him during his first marriage (Pet. 8). The decedent made this "rather unorthodox bequest * * * to his wife" (Pet. 6) because he wanted to be certain that after his death his widow (who was his second wife) would financially treat his daughter by his previous marriage equally with the three children of his second marriage. After decedent's death, his widow, in accordance with the conditions contained in Part I of his will, executed and filed the prescribed agreement in the Surrogate's Court and took under Part I of the will.

The Commissioner disallowed the claimed marital deduction, and the lower courts upheld the Commissioner's determination (Pet. 5-13). The district court found that what decedent's widow had received under Part I of his will was not a fee simple interest as petitioner contended but rather that her interest "more closely resembled a life estate with a broad, but not unlimited, power to consume" (Pet. 8). Accordingly the district court held that the bequest re-

ceived by decedent's surviving spouse under Part I of his will did not qualify for the marital deduction, since it constituted a terminable interest as defined in Code § 2056(b)(1) and did not fit within the exception to the terminable interest rule contained in § 2056(b)(5).

The court of appeals affirmed the judgment of the district court on the ground that (Pet. 11-12):

> Viewed at the moment of his death, the bequest to Allen's spouse under Part I of his will was subject to at least two contingencies, each of which could have caused it to fail: (1) Kathleen [decedent's surviving spouse] might not have elected to take under Part I at all; or, (2) even if she had executed the agreement to devise all of her property to Allen's four children equally, there remained the need for the Surrogate's approval and the possibility that he might not give it. * * * Thus, at the crucial moment of Allen's death, the bequest to his spouse, could not qualify for the marital deduction because all three characteristics of a terminable interest were present. The interest passing to Allen's spouse under Part I could have lapsed by her failure to execute the "required agreement" or by the refusal of the Surrogate to approve. As a result, a "third party", specifically, Allen's daughter by the first marriage, could have enjoyed or possessed the residue of her father's estate by virtue of the contingent interest which passed to her under Part II.

The judgment below is correct; there is no conflict of decisions, and no general issue of importance is presented.

It is well settled that the terminable-interest rule of 1954 Code § 2056(b)(1) prevents any estate tax marital deduction where the decedent bequeaths to his surviving spouse only a life estate in certain property.[1] For in such a case the happening of an event or contingency (i.e., the surviving spouse's death) may cause another of decedent's devisees or legatees (i.e., the remainderman) to possess or enjoy part of all of such property. 1954 Code § 2056(b)(1). In general, in order for a marital deduction to be allowed, the interest in property of the decedent which passes to his surviving spouse under his will at the moment of his death must be either an interest in fee simple to the property in question —in which event the interest would not be a terminable one under § 2056(b)(1)—or a life estate plus an unlimited power to dispose of the property, either during her life or at her death—in which event there is a specific statutory exception to the terminable-interest rule—see 1954 Code § 2056(b)(5).

Here the district court found that under New York law the interest which decedent's spouse had received pursuant to Part I of his will "closely resembled a life estate with a broad, but not unlimited, power to consume" (Pet. 8). Petitioners do not challenge that

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[1] See *Cunha's Estate* v. *Commissioner*, 279 F. 2d 292 (C.A. 9), certiorari denied, 364 U.S. 942; *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3); *In re Reilly's Estate*, 239 F. 2d 797 (C.A. 3); *Stedman* v. *United States*, 233 F. Supp. 569 (D. Mass.); *Harris* v. *United States*, 193 F. Supp. 736 (D. Neb.); cf. *Bookwalter* v. *Lamar*, 323 F. 2d 664 (C.A. 8), certiorari denied, 376 U.S. 969; *United States* v. *Mappes*, 318 F. 2d 508 (C.A. 10).

holding in this Court. Since, under the applicable State law, the unconsumed portion of the property here in question will, upon the widow's death, pass to the residuary legatees named in decedent's will, the bequest to her is a terminable interest under Code § 2056(b)(1). Moreover, since she did not have an unlimited power to dispose of the property, either during her life or at her death, the one exception to the terminable interest rule stated in § 2056(b)(5) does not apply.[2] Therefore, the decision of the district court was correct.

This Court in *Jackson* v. *United States*, 376 U.S. 503, recognized (p. 508):

> * * * that in considering terminability of an interest for purposes of a marital deduction "the situation is viewed as at the date of the decedent's death."

Therefore, the court of appeals concluded that the bequest here in question is a non-deductible terminable interest for a second reason. "[A]t the crucial moment of [decedent's] death, the bequest to his spouse * * * under Part I [of his will] could have lapsed by her

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[2] See *United States* v. *Lincoln Rochester Trust Co.*, 297 F. 2d 891 (C.A. 2), certiorari denied, 369 U.S. 887; *May's Estate* v. *Commissioner*, 283 F. 2d 853 (C.A. 2), certiorari denied, 366 U.S. 903; *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3); *Pipe's Estate* v. *Commissioner*, 241 F. 2d 210 (C.A. 2), certiorari denied, 355 U.S. 814; cf. *United States* v. *First Nat. Trust & Sav. Bank of San Diego*, 335 F. 2d 107 (C.A. 9); *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438 (C.A. 8); *Piatt* v. *Gray*, 321 F. 2d 79 (C.A. 6); *Shedd's Estate* v. *Commissioner*, 237 F. 2d 345 (C.A. 9), certiorari denied, 352 U.S. 1024; *Starrett* v. *Commissioner*, 223 F. 2d 163 (C.A. 1).

failure to execute the 'required agreement' * * * [and as] a result, a 'third party', specifically, Allen's daughter by the first marriage, could have enjoyed or possessed the residue of her father's estate * * *" (Pet. 11).

There is no conflict of decisions, and the "unorthodox bequest" (Pet. 6) here in question does not present any recurring or important problem in the administration of the revenue laws. The petition for certiorari should be denied.

Respectfully submitted,

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